Supreme Court of the United States

OCTOBER TERM, 1965

No. 256

UNITED STATES, APPELLANT

vs.

JOHN W. COOK

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

INDEX

[fol. 1]

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

Criminal No. 13,717

18 U.S.C. § 660

UNITED STATES OF AMERICA

v.

JOHN W. COOK

INDICTMENT—Filed December 15, 1964

The Grand Jury charges:

On or about the 10th day of June 1964, in the Nashville Division of the Middle District of Tennessee, John W. Cook, being an employee, that is, a truck driver for Tolbert Hawkins, an individual engaged in commerce as a common carrier, riding in and upon a truck of such carrier moving in interstate commerce from Tampa, State of Florida, to Lebanon, State of Tennessee, wilfully and knowingly did embezzle, steal and convert to his own use monies of the said carrier arising and accruing from such commerce, to wit, the sum of approximately $200.00, which sum was part of the monies of said carrier arising and accruing from an interstate shipment of bananas from Tampa, Florida, to Lebanon, Tennessee.

In violation of Title 18, United States Code, Section 660.

A TRUE BILL

/s/ Claude B. Garrison
Foreman

/s/ James F. Neal
United States Attorney

[fol. 1 A]

Form No. 135

No. .....

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

THE UNITED STATES OF AMERICA

vs.

JOHN W. COOK

INDICTMENT

18 U.S.C., § 660

A true bill,

/s/ Claude B. Garrison
Foreman.

Filed in open court this ..... *day of* ....., *A. D. 19*.....

Clerk.

Bail, $ .....

[File Endorsement Omitted]

[fol. 2]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 13,717

[File Endorsement Omitted]

UNITED STATES OF AMERICA

v.

JOHN W. COOK

MOTION TO WITHDRAW PLEA OF NOT GUILTY AND TO DISMISS INDICTMENT—Filed March 17, 1965

1. Comes the defendant, John W. Cook, and moves the Court that he be permitted to withdraw his plea of not guilty, heretofore entered in this cause.

2. The defendant, John W. Cook, further moves the Court to dismiss the indictment, heretofore returned against him by the Grand Jury, upon the following ground:

The indictment is predicated on Title 18, United States Code, Section 660, which statute declares in pertinent part as follows:

> "Whoever, being a president, director, officer, or manager of any firm, association, or corporation engaged in commerce as a common carrier, or whoever, being an employee of such common carrier riding in or upon any * * * motortruck, * * * of such carrier moving in interstate commerce, embezzles, * * * any of the moneys, * * * of such firm, association or corporation arising or accruing from * * * such commerce, * * * shall be fined not more than $5,000 or imprisoned not more than ten years, or both."

Said indictment is fatally defective on its face in that it charges the defendant with embezzlement of moneys

as an employee of an individual engaged in interstate commerce, whereas the statute penalizes embezzlement by an employee of a firm, association, or corporation engaged in such commerce.

Respectfully submitted,

/s/ Thomas H. Peebles III
Attorney for Defendant

[fol. 3]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Criminal No. 13,717

UNITED STATES OF AMERICA

v.

JOHN W. COOK

ORDER DISMISSING INDICTMENT—March 18, 1965

Upon motion of the defendant to dismiss the indictment in the above cause on the ground that it fails to charge an offense against the United States and upon argument of counsel, the Court is satisfied that the indictment, in charging that the defendant acted as an employee of "an individual" fails to charge a violation of 18 U.S.C., § 660 which only forbids the proscribed acts when committed by employees of a "firm, association or corporation", and it is accordingly

ORDERED, ADJUDGED AND DECREED by the Court that the indictment in the above cause be dismissed and that the Marshal release the defendant.

/s/ Frank Gray, Jr.
United States District Judge

Approved for Entry:

JAMES F. NEAL
United States Attorney

/s/ Carrol D. Kilgore
CARROL D. KILGORE
Assistant U.S. Attorney

March 18, 1965

[fol. 4]

IN THE UNITED STATES DISTRICT COURT

DOCKET ENTRIES

THE UNITED STATES

vs.

JOHN W. COOK, Metro Jail, Nashville, Tennessee

VIOLATIONS; Sec. 660, ONE (1) COUNT
Title 18 USC. (Embezzlement of moneys from Carrier moving goods interstate commerce, etc).

ATTORNEYS

For U. S.:

JAMES F. NEAL & Staff

For Defendant:

THOMAS H. PEEBLES, III
(appointed)

Statistical Record	Costs
J.S. 2 mailed	Clerk
J.S. 3 mailed	Marshal
Violation	Docket fee
Title	
Sec.	

Date	Proceedings
12/15/64	Indictment filed. (B.O.P.s filed Nov. 2, 1964)
2/19/65	Defendant P.N.G.—ORDER entered that this case be set for trial on February 24, 1965.
2/20/65	ORDER entered that this case, heretofore set to be tried on February 24, 1965—is passed to be reset. Copy to U.S.D.A.

Date	Proceedings
3/15/65	Subpoenas issued to Gene Shehane; Daniel Norton; Kenneth O. Lester; Tolbert Hawkins and Dave Phelps (latter 3 to bring documents) all to appear on behalf of Government 22nd March, 1965—8:00 A.M. Two of each to U. S. Marshal for execution.
3/17/65	Motion filed by defendant to be permitted to withdraw his plea of guilty; also MOVES the Court to dismiss the indictment—said indictment is defective in that it charges defendant with embezzlement of moneys as an 'employee of one engaged in interstate commerce whereas the statute penalty is for embezzlement by an employee of a firm, etc, engaged in such commerce. Certificate of service attached.
3/18/65	ORDER entered that this case be dismissed—upon MOTION of the defendant, on grounds that indictment fails to charge an offense against the United States; ORDERED that the U. S. Marshal release the defendant. Attested copy to U. S. Marshal and one to U.S.D.A.
4/16/65	NOTICE of APPEAL to the SUPREME COURT of the UNITED STATES filed by the Plaintiff, the United States of America.
4/26/65	Official Court Reporter's transcript filed . . . proceedings had on March 18, 1965.
4/28/65	Certified copy of the record designated in the Notice of Appeal delivered to United States Attorney, with transmittal letter.

[fol. 5]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

Crim. No. 13,717

[File Endorsement Omitted]

UNITED STATES OF AMERICA, PLAINTIFF

v.

JOHN W. COOK

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed April 16, 1965

I. Notice is hereby given that the United States appeals to the Supreme Court of the United States from the order of March 18, 1965, dismissing the indictment which charged the defendant, John W. Cook with violating 18 U.S.C. 660.

This appeal is taken pursuant to 18 U.S.C. 3731.

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States and include therein the following:

1. Transcript of docket entries.
2. Indictment.
3. Motion to dismiss the indictment.
4. Order of March 18, 1965, dismissing the indictment.
5. This Notice of Appeal.

III. The following question is presented by the appeal:

Whether an indictment which charges an employee of an "individual" common carrier in interstate commerce with theft of money of his employer accruing from in-

terstate commerce, charges an offense under 18 U.S.C. 660 which proscribes such conduct when committed by the employee "of any firm, association, or corporation engaged in commerce as a common carrier."

[fol. 6] Dated this 15th day of April, 1965.

/s/ James F. Neal
United States Attorney
Middle District of Tennessee

[Certificates of Service Omitted in Printing]

[fol. 7]
[Clerk's Certificate Omitted in Printing]

[fol. 8]

SUPREME COURT OF THE UNITED STATES

No. 256, October Term, 1965

UNITED STATES, APPELLANT

v.

JOHN W. COOK

APPEAL from the United States District Court for the Middle District of Tennessee.

ORDER NOTING PROBABLE JURISDICTION—December 13, 1965

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 797325 423

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. ——

UNITED STATES OF AMERICA, APPELLANT

v.

JOHN W. COOK

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

JURISDICTIONAL STATEMENT

ORDER BELOW

The order of the district court dismissing the indictment (R. 3, *infra*, p. 7) is not reported.

JURISDICTION

The order of the district court dismissing the indictment was entered on March 18, 1965. Notice of appeal to this Court was filed in the district court on April 16, 1965. The jurisdiction of this Court to review, on direct appeal, a judgment dismissing an indictment because of a construction of the statute on which the indictment is founded is conferred by 18 U.S.C. 3731.

777-020—65

STATUTE INVOLVED

18 U.S.C. 660 provides in pertinent part:

> Whoever, being a president, director, officer, or manager of any firm, association, or corporation engaged in commerce as a common carrier, or whoever, being an employee of such common carrier riding in or upon any railroad car, motortruck, steamboat, vessel, aircraft or other vehicle of such carrier moving in interstate commerce, embezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property, or assets of such firm, association, or corporation arising or accruing from, or used in, such commerce, in whole or in part, or willfully or knowingly converts the same to his own use or to the use of another, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.
>
> * * * * *

QUESTION PRESENTED

Whether an indictment which charges an employee of an "individual engaged in commerce as a common carrier" with the theft of money of his employer arising from interstate commerce charges an offense under 18 U.S.C. 660.

STATEMENT

An indictment returned in the United States District Court for the Middle District of Tennessee alleged that respondent, a truck driver employed by Tolbert Hawkins, "an individual engaged in commerce as a common carrier," stole approximately

$200.00 belonging to the carrier which had accrued from an interstate shipment of bananas (R. 5, *infra*, p. 8). On respondent's motion (R. 4), the district court dismissed the indictment. The court held that in charging that the respondent committed the proscribed acts as an employee of an "individual" common carrier, the indictment failed to charge an offense within 18 U.S.C. 660, which punishes the prohibited conduct only when committed by an employee of a "firm, association or corporation" engaged in commerce as a common carrier (R. 3, *infra*, p. 7).

THE QUESTION IS SUBSTANTIAL

Under the interpretation of 18 U.S.C. 660 adopted by the court below, the employee of an individual common carrier who embezzles funds of his employer is not guilty of a federal crime, although the same acts, if committed by an employee of a partnership or corporate carrier, would constitute a federal offense. We believe that this is an unreasonably narrow construction and one which is at odds with the underlying purpose of the statute. We believe the question to be important since we have been informed by the Interstate Commerce Commission that there are a substantial number of individual carriers who operate in interstate commerce, some of whom are fairly large employers. The issue may thus recur and should be settled.[1]

---

[1] An interpretation similar to that adopted by the court below was adopted by the Court of Appeals for the Tenth Circuit in *Schmokey* v. *United States*, 182 F. 2d 937.

1. The statute punishes embezzlement by two groups: (1) "a president, director, officer, or manager of any firm, association, or corporation engaged in commerce as a common carrier" and (2) "an employee of such common carrier" riding on a vehicle of his employer moving in interstate commerce. Its literal language is broad enough to cover employees of individual common carriers. The word "firm", although often applied to a partnership, has also been defined as "the name, title or style under which a company transacts business." *Webster's Third New International Dictionary, Unabridged* (1961 ed.). Hence an individual owner, even if he does business under his own name, is operating as a "firm". Moreover, the Interstate Commerce Act defines "common carrier" as "persons, natural or artificial" (Interstate Commerce Act of 1887, Part I, 24 Stat. 379, as amended, 49 U.S.C. 1(3)(a)) and as "any person" (Motor Carrier Act of 1935, 39 Stat. 543, as amended, 49 U.S.C. 303(a)(14)). Consequently, the words "employee of such common carrier" should be construed to include employees of individual persons.

2. The legislative history of 18 U.S.C. 660 confirms the view that employees of an individual common carrier are subject to its provisions. The two classes of persons covered by the statute—officers and employees—were originally covered by separate provisions. The "employee" section was part of what is now 18 U.S.C. 659 (see 18 U.S.C. 409(a)(5) (1946 ed.)) and the "director" provision constituted a separate Section, 18 U.S.C. 412 (1946 ed.). These were combined in the 1948 revision of the Criminal Code.

The "director" provision derives from Section 9 of the Clayton Act, 38 Stat. 733–734. The "employee" section was enacted into law in 1946 as an amendment to an act of 1913, 37 Stat. 670, which punished theft from interstate commerce and which, in the intervening years, had been gradually expanded. As amended in 1946, the "employee" statute (60 Stat. 656, 657) read (emphasis added):

> (a) Whoever shall—
>
> * * * * *
>
> (5) *being an employee of any carrier* riding in, on or upon any railroad car, motortruck, steamboat, vessel, aircraft, or other vehicle of such carrier transporting passengers or property in interstate or foreign commerce and having in his custody funds arising out of or accruing from such transportation, embezzle or unlawfully convert to his own use any such funds; shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both.

Thus, before the 1948 revision, the section clearly covered employees of "any carrier," thereby including individual carriers. There is nothing to indicate that, when the revisers combined the two sections, they intended to narrow the scope of the "employee" portion. The present 18 U.S.C. 659 (of which the "employee" provision was once a part) reaches, *inter alia*, "whoever" steals and embezzles property which is part of an interstate shipment or baggage in the possession of "any common carrier," and this language surely includes the property of an individual carrier. There

is no reason to believe that Section 660 was meant to have any narrower coverage. The merger of the two separate provisions into Section 660 by the revisers, without comment as to scope, suggests that the revisers thought that "firm, association, or corporation" had the same meaning as "any such carrier" and that both covered an individual common carrier.

CONCLUSION

It is respectfully submitted that probable jurisdiction should be noted.

ARCHIBALD COX,
Solicitor General.
FRED M. VINSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
JEROME M. FEIT,
Attorneys.

JUNE 1965.

APPENDIX

United States District Court for the Middle District of Tennessee, Nashville Division

Criminal No. 13,717

UNITED STATES OF AMERICA

v.

JOHN W. COOK

ORDER

Upon motion of the defendant to dismiss the indictment in the above cause on the ground that it fails to charge an offense against the United States and upon argument of counsel, the Court is satisfied that the indictment, in charging that the defendant acted as an employee of "an individual" fails to charge a violation of 18 U.S.C., § 660 which only forbids the proscribed acts when committed by employees of a "firm, association or corporation", and it is accordingly

ORDERED, ADJUDGED AND DECREED by the Court that the indictment in the above cause be dismissed and that the Marshal release the defendant.

ENTER:

FRANK GRAY, Jr.,
United States District Judge.

Approved for Entry:

JAMES F. NEAL,
United States Attorney.
CARROL D. KILGORE,
Assistant U.S. Attorney.

March 18, 1965

United States District Court for the Middle District of Tennessee, Nashville Division

Criminal No. 13,717 (18 U.S.C. § 660)

UNITED STATES OF AMERICA

v.

JOHN W. COOK

INDICTMENT

The Grand Jury charges:

On or about the 10th day of June 1964, in the Nashville Division of the Middle District of Tennessee, John W. Cook, being an employee, that is, a truck driver for Tolbert Hawkins, an individual engaged in commerce as a common carrier, riding in and upon a truck of such carrier moving in interstate commerce from Tampa, State of Florida, to Lebanon, State of Tennessee, wilfully and knowingly did embezzle, steal and convert to his own use monies of the said carrier arising and accruing from such commerce, to wit, the sum of approximately $200.00, which sum was part of the monies of said carrier arising and accruing from an interstate shipment of bananas from Tampa, Florida, to Lebanon, Tennessee.

In violation of Title 18, United States Code, Section 660.

A TRUE BILL:

CLAUDE B. GARRISON
FOREMAN

JAMES F. NEAL
UNITED STATES ATTORNEY

U.S. GOVERNMENT PRINTING OFFICE: 1968

INDEX

CITATIONS

205-472—66——1

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 256

UNITED STATES OF AMERICA, APPELLANT

v.

JOHN W. COOK

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

BRIEF FOR THE UNITED STATES

OPINION BELOW

The order of the district court dismissing the indictment (R. 4–5) is not reported.

JURISDICTION

On March 18, 1965, the district court dismissed the indictment on the ground that 18 U.S.C. 660 does not extend to the conduct of an employee of an individual engaged in commerce as a common carrier (R. 4–5). Notice of appeal to this Court was filed in the district court on April 16, 1965 (R. 8–9), and probable jurisdiction was noted on December 13, 1965 (R. 9). The jurisdiction of this Court to review, on direct appeal, a judgment dismissing an indictment based upon a

construction of the statute on which the indictment is founded is conferred by 18 U.S.C. 3731.

QUESTION PRESENTED

Whether 18 U.S.C. 660, prohibiting certain embezzlements by employees of "any firm, association, or corporation engaged in commerce as a common carrier," applies to the conduct of an employee of an individual doing business as a common carrier.

STATUTE INVOLVED

18 U.S.C. 660 provides, in pertinent part:

> Whoever, being a president, director, officer or manager of any firm, association, or corporation engaged in commerce as a common carrier, or whoever, being an employee of such common carrier riding in or upon any railroad car, motortruck, steamboat, vessel, aircraft or other vehicle of such carrier moving in interstate commerce, embezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property, or assets of such firm, association, or corporation arising or accruing from, or used in, such commerce, in whole or in part, or willfully or knowingly converts the same to his own use or to the use of another, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.
>
> * * * * *

STATEMENT

On December 15, 1964, an indictment was returned in the United States District Court for the Middle District of Tennessee alleging that, while riding on

his employer's truck, appellee, "a truck driver for Tolbert Hawkins, an individual engaged in commerce as a common carrier," embezzled approximately $200.00 "of the monies of said carrier" accruing from an interstate shipment of bananas (R. 1). On appellee's motion (R. 3–4), the district court dismissed the indictment. The court held that the indictment failed to charge an offense within 18 U.S.C. 660 because it charged that appellee "acted as an employee of 'an individual'" while Section 660 "only forbids the proscribed acts when committed by employees of a 'firm, association or corporation'" (R. 4–5).[1]

ARGUMENT

INTRODUCTION AND SUMMARY

In describing the common carrier entities protected from embezzlement by 18 U.S.C. 660, Congress used

[1] A similar construction of Section 660 was adopted by the Court of Appeals for the Tenth Circuit in 1950 in *Schmokey* v. *United States*, 182 F. 2d 937, the only other case we have been able to find dealing with the question whether a carrier owned by an individual is protected from embezzlement by Section 660. The *per curiam Schmokey* decision did not consider whether the exclusion of individually owned carriers from the protection of Section 660 would be consistent with the purposes served by Section 660, nor did it suggest that Section 660 could not be read to include individually owned carriers within the language "any firm, association, or corporation engaged in commerce as a common carrier." Instead, the court relied upon the proposition that a "criminal statute must be strictly construed * * *" (182 F. 2d at 937–938). We submit, *infra*, pp. 15–17, that the doctrine of strict construction is not dispositive of this case in light of the lack of any conceivable legislative purpose to exclude carriers owned by individuals from the protection of the Act, while including carriers owned in forms of multiple ownership.

the phrase, "any firm, association, or corporation engaged in commerce as a common carrier." This statutory language, we submit, applies to embezzlements committed against individuals engaged as common carriers, as well as to embezzlements of the funds of corporations, partnerships and other associations. The legislative purpose to include within the protection of the statute all common carriers, regardless of the particular form of ownership of the business, appears unmistakably from the history of the statute which shows that all carriers—including individually owned carriers—were protected from employee embezzlement by the immediate predecessor to Section 660. No change in the scope of this protection was intended by the 1948 ~~version~~ revision of the Criminal code. There is, in addition, no conceivable reason to attribute to Congress a legislative purpose to exclude individually owned carriers from the statute's protection while protecting all forms of multiple ownership, regardless of size. In these circumstances, the doctrine of "strict construction" should not be used to override the evident statutory purpose.

I.

THE PREDECESSOR OF SECTION 660 CLEARLY APPLIED TO EMBEZZLEMENTS BY THE EMPLOYEES OF INDIVIDUALS ENGAGED AS COMMON CARRIERS

Section 660 punishes embezzlements from a common carrier by either (1) "a president, director, officer, or manager of any firm, association, or corporation engaged in commerce as a common carrier," or (2) "an employee of such common carrier riding in or upon any * * * vehicle of such carrier moving in

interstate commerce." While embezzlements of carrier funds[2] by both categories of persons are thus covered by a single statutory provision in the present Code, the separate groups—named executives, and employees riding in vehicles in commerce—were the subject of distinct criminal provisions before the 1948 revision.

The language relating to executives derives from Section 412 of the Criminal Code (18 U.S.C. (1946 ed.) 412). This provision was originally enacted as part of the Clayton Act of 1914 (38 Stat. 730, 733–734) in reaction to a multi-million dollar fraud which had been perpetrated on the New York, New Haven and Hartford railroad. It was modeled after a similar provision in the National Banking Act (See 51 Cong. Rec. 14031–14032).

Section 412, like present Section 660, applied to named executives of "any firm, association, or corporation engaged in commerce as a common carrier" who embezzled carrier funds arising from or used in commerce. In pertinent part, Section 412 read as follows:

> Every president, director, officer, or manager of any firm, association, or corporation engaged in commerce as a common carrier, who em-

[2] The statute does not punish all embezzlements by the designated persons, but only appropriations of "any of the moneys, funds, credits, securities, property, or assets of such firm, association, or corporation arising or accruing from, or used in, such commerce * * *." The indictment in this case charged the appellee with appropriating monies of his employer "arising and accruing from an interstate shipment of bananas from Tampa, Florida, to Lebanon, Tennessee" (R. 1).

> bezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property, or assets of such firm, association, or corporation arising or accruing from, or used in, such commerce, in whole or in part, or willfully or knowingly converts the same to his own use or to the use of another, shall be deemed guilty of a felony * * *.

The provision of the Banking Act on which Section 412 was apparently patterned (R.S. 5209; Section 55 of the National Banking Act of 1864, 13 Stat. 116, as amended) proscribed embezzlements by certain employees of any banking "association," defined in R.S. 5133 as "any number of natural persons, not less in any case than five." The provision of Section 412 protecting "any firm, association, or corporation engaged in commerce as a common carrier" was clearly designed to be of more general applicability. We submit that it is a fair inference, from this context and language alone, that the phrase "any firm, association, or corporation engaged in commerce as a common carrier" was designed to apply to all common carriers, regardless of their particular form of ownership. A "firm" may be any business organization—individually owned or otherwise[3]—and there seems little reason for its inclusion in the statutory phrase in Section 412 (in addition to words covering

[3] Webster's *Third New International Dictionary—Unabridged* (1961 ed.) p. 856, defines "firm" not only as "a partnership of two or more persons not recognized as a legal person distinct from the members composing it," but also as "the name, title, or style under which a company transacts business: the firm name" and any "business unit or enterprise." See, also, *New English Dictionary*, Vol. IV, p. 247 (Oxford 1901).

associations—including partnerships—and corporations) except as a general term extending to all other forms of carrying on business as a common carrier. In all events, as we now show, it was entirely clear prior to the 1948 Code that the "employee" embezzlement provision (which was combined in the 1948 revision with Section 412 in a single new Section 660) was applicable regardless of the carrier's form of organization.

The "employee" provision, prohibiting embezzlements by an employee of a carrier riding on a vehicle of the carrier moving in interstate commerce, was derived from Section 409(a)(5) of the 1946 Criminal Code. Section 409(a)(5) (60 Stat. 656–657) was one of a series of broadening amendments to a still earlier 1913 statute dealing with the prosecution of larcenous conduct affecting surface carriers in interstate commerce. (See H. Rep. No. 415, 62d Cong., 2d Sess., p. 1). Just prior to the enactment of Section 409(a)(5), the larceny provision covered larceny of property in commerce from the premises or vehicles of "any person, firm, association, or corporation" carrying the stolen shipment (43 Stat. 793), thus clearly disregarding the form of ownership of the carrier. Moreover, this language had come into the statute in 1925 under circumstances particularly suggesting Congress' concern to protect small local carriers.[4]

[4] Such carriers had, to some extent, been held to be outside the protection of the original 1913 Act. See *Beckerman* v. *United States*, 267 Fed. 185 (C.A. 7); see also *Hearings, on Transportation of Interstate Shipments From Wagons, Automobiles, Trucks, etc.*, before The House of Representatives Committee on the Judiciary, 68th Cong., 1st Sess., pp. 2–27 (1924); H. Rep. No. 389, 68th Cong., 1st Sess.; S. Rep. No. 814, 62d Cong., 2d Sess.

In 1946, Congress undertook a general clarification of this larceny statute; at the same time, it broadened the scope of the statute to include embezzlement as well as larceny and to cover air as well as surface transportation. (See H. Rep. No. 1116, 79th Cong., 1st Sess., p. 1; S. Rep. No. 1632, 79th Cong., 2d Sess., pp. 1–2.) The result was Section 409 of the 1946 Criminal Code (18 U.S.C. 409 (1946 ed.)). A subpart of this section, Section 409(a)(5) (60 Stat. 656, 657), covered embezzlements by employees of "*any carrier* * * * transporting passengers or property in interstate or foreign commerce" while such employees were riding on their employers' vehicles in interstate commerce (emphasis added).[5]

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[5] The legislative history underlying the adoption of the new employee-embezzlement provision indicates the continuing lack of any limitations based upon the form of ownership of the carrier. In March, 1945, Senator McCarran introduced a bill (S. 739, 79th Cong., 1st Sess.) which would have made it a crime to embezzle funds belonging to or in the lawful possession of a carrier "arising or accruing from" interstate commerce when the embezzlement was committed by a "director, officer, or employee of any person, firm, association or corporation engaged in commerce as a carrier * * *." In express terms, the proposed statute thus included all employees of all carriers, regardless of their form of ownership. On June 21, 1945, a hearing was held by a subcommittee of the Senate Committee on the Judiciary on both this proposal and a companion piece of legislation proposed by the Department of Justice. (This hearing, designated herein as "H," was not printed. A full transcript, plus additional recommendations from interested parties, including Attorney General Francis Biddle, which were considered by the subcommittee, is available at the Legislative Branch, National Archives Building, Washington, D.C.). At this hearing the General Counsel of the American Trucking Association, a national association of both common and private carriers, testified that "the size and the enormity of the embezzlement problem" was very real in the industry (H. 20);

Section 409(a)(5) provided in full:

> (a) Whoever shall—
>
> * * * * *
>
> (5) being an employee of any carrier riding in, on or upon any railroad car, motortruck, steamboat, vessel, aircraft, or other vehicle of such carrier transporting passengers or property in interstate or foreign commerce and having in his custody funds arising out of or accruing from such transportation, embezzle or unlawfully convert to his own use any such funds; shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both.

The provision, in terms, covered an employee of "any carrier" regardless of the form of the employers' ownership. It unquestionably and deliberately covered the employees of individuals engaged as com-

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that passage of a bill like S. 739 and one or two successful prosecutions thereunder would serve as a real deterrent to employee dereliction (H. 21); that state prosecutions were rare and infrequent since "State officials [say] they have no jurisdiction over interstate crimes" (H. 23, H. 22); and that members of the Association have lost "thousands of dollars" every year "from this type of offense which is not covered by a federal law and which the state courts are unable to handle" (H. 32). The Justice Department opposed the bill primarily on the ground that it would bring into federal courts minor embezzlements and thefts of a local nature which were better left to state action (H. 10). The Department of Justice recognized the problem faced by the truckers but was of the view that it could "be adequately dealt with," by less encompassing legislation (H. 29–30, 33).

The employee embezzlement provision ultimately adopted in 1946 (H.R. 4180) was different in form from S. 739 (upon which no further action was apparently taken). In view of its application in terms to "any carrier," however, it obviously was meant to have application regardless of the form of the

mon carriers.[6] It remains only to point out that, by combining this employee-embezzlement provision of Section 409(a)(5) with the executive-embezzlement provision of Section 412 in the 1948 revision of the Criminal Code, Section 660, Congress intended no diminution of the scope of either section.

II.

THE 1948 REVISION OF THE CRIMINAL CODE DID NOT NARROW THE APPLICATION OF THE EMBEZZLEMENT PROVISION TO EXCLUDE PROTECTION TO CARRIERS OWNED BY INDIVIDUALS

In the 1948 revision of Title 18, the employee-embezzlement provision of Section 409(a)(5) of the 1946 Code was joined with the executive-embezzlement provision of Section 412 of the 1946 Code. The result

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carrier's ownership. It was enacted over the very same objections as to its breadth that had earlier been raised by the Department of Justice. See the letter from Attorney General Clark (as he then was) to the Senate Committee in opposition to H.R. 4180, contained in S. Rep. No. 1632, 79th Cong., 2d Sess., pp. 2–3. The Attorney General further urged, in particular, that the word "common" should be inserted before the word carrier or otherwise "the bill would apply to theft or embezzlement even from a private automobile if it is being used to take baggage across State lines." There seems no question that in thus passing this legislation over the objections of the Department of Justice, Congress intended no limitation which would bar application of the new provision to carriers owned by individuals.

[6] This meaning of the words "any carrier" is evident, not only from the language and the history detailed in footnotes 4 and 5, *supra*, but is further supported by the fact that the Interstate Commerce Act of 1887 (24 Stat. 379, as amended 41 Stat. 474, now Interstate Commerce Act, Part I, 49 U.S.C. 1(3)(a)) defines "common carrier" to include "all persons, natural or artificial." See also the Motor Carrier Act of 1935 (44 Stat. 543, as amended 49 U.S.C. 303(a)), defining contract carriers and common carriers by motor vehicle as "any person" ((a)(14) and (15)) and any person as including "any individual * * *" ((a)(1)).

was a new Section 660. In merging these two provisions, Congress used the language "any firm, association, or corporation engaged in commerce as a common carrier," appearing in former Section 412, to describe the entities protected, rather than the language "any carrier * * * transporting passengers or property in * * * commerce" of former Section 409. For reasons which we specify below, it is clear that in doing so Congress had no purpose to narrow the reach of the prohibition upon employee embezzlement in order to exclude protection to carriers owned by individuals. Rather, Congress plainly understood the two phrases, "any carrier * * * in * * * commerce" and "any firm, association, or corporation engaged in commerce as a common carrier," as equivalents. It evidently found the latter phrase, derived from Section 412, stylistically more suitable for use throughout the new section because the new provision began with an incorporation of the language of Section 412 covering executive embezzlements.

a. Had Congress understood the phrase, "any firm, association, or corporation engaged in commerce as a common carrier," to be any narrower in application than the phrase, "any carrier * * * in * * * commerce," the result of the 1948 revision would have been to restrict the scope of the coverage of the employee-embezzlement provision which previously, in terms, covered "any carrier * * * in * * * commerce." Such a change, if it had been thought to exclude from Section 660 individually owned carriers previously covered under Section 409(a)(5), would have been of major substantive significance. The 1948 revision, however, was not a revision of substance, un-

less the contrary was stated with specific clarity.[7] The Senate Judiciary Committee Report accompanying the bill which became the 1948 revision noted that the general purpose was only "to codify and revise * * *. The original intent of Congress is preserved." S. Rep. No. 1620, 80th Cong., 2d Sess. p. 1. With regard to the issue in this case, no intention to change the former provisions was declared. On the contrary, the Reviser's Note accompanying Section 660, while it notes that the section "consolidates a portion of Section 409 with Section 412," states only (so far as relevant here) that "[c]hanges were made in phraseology."

b. The only conclusion consistent with this manifested legislative purpose is that the phrase "any firm, etc." was deemed the equivalent of the phrase "any carrier, etc." This conclusion is further underscored by the fact that the Revisers retained the phraseology "any * * * carrier" in Section 659 of the 1948 Code, into which the provisions of Section 409 other than subsection (a)(5) were placed. The originally uniform coverage of Section 409 was, we submit, clearly not designed to be interrupted in the 1948 revision simply by the transfer of one of the provisions of Section 409 to the next succeeding section of the Code. This Court's statement with regard to revision of Title 28 in 1948 in *Fourco Glass Co.* v. *Transmirra,* 353 U.S. 222, 227 (quoting from an earlier decision) is fully applicable in these circumstances:

> "The change of arrangement, which placed portions of what was originally a single section in two separated sections cannot be regarded as

[7] See *Honea* v. *United States*, 344 F. 2d 798 (C.A. 5).

> altering the scope and purpose of the enactment. For it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed [citations omitted]."

See, also, *United States* v. *Welden*, 377 U.S. 95, 98–99, n. 4.

c. Finally, it would be wholly unreasonable, we believe, to attribute to Congress the intention to make criminal liability under Section 660 turn on whether a carrier from which funds are embezzled is individually owned, on the one hand, or is a partnership, other association, or corporation, on the other. The absence of any criteria of size in Section 660 shows that Congress intended the section to apply to small as well as to large carriers; indeed the small operator may well be the easier prey for embezzlement and most in need of the statutory protection. A small carrier will surely be less able to bear the losses occasioned by the embezzlement of the proceeds of individual shipments, the type of situation here involved.

Individually owned carriers comprise a large portion of these small carriers engaged in commerce.[8] Having undertaken to protect small as well as large carriers from employee embezzlement through a

[8] Our recent examination of the records of the Interstate Commerce Commission showed that there were 11,700 Class III motor carriers of property (*i.e.*, those with an annual revenue of less than $200,000). A random sampling of the business structure of approximately 1,500 of these showed that as of the end of 1964 almost 40% of the sample were individually owned and operated and had a total of 2,000 employees. During the same period only about 1% of the 1,500 operated in partnership form. The remainder operated as corporations.

criminal statute, it would attribute a capricious legislative purpose to infer that Congress meant to distinguish among such carriers based upon their form of ownership, immunizing from criminal sanctions the employees of individually owned carriers while punishing precisely the same conduct when committed by identically placed employees of small partnerships or wholly owned individual or family corporations. The formal structure of the employer's business is a wholly irrelevant consideration in the application of such a statute and there is no reason to suppose that Congress thought otherwise. In sum, the purpose, as well as the language and history of Section 660, show its applicability to carriers without regard to their form of ownership.

III.

THE DOCTRINE OF "STRICT CONSTRUCTION" DOES NOT REQUIRE THE EXCLUSION OF CARRIERS OWNED BY INDIVIDUALS FROM THE PROTECTION OF SECTION 660

We have shown above that the exclusion of carriers owned by individuals from the protection of Section 660 can be accomplished only by giving the phrase "any firm, association, or corporation engaged in commerce as a common carrier" a narrow construction inconsistent with the purposes and the history of the legislation. In these circumstances, such a strict construction should not be adopted. The rule of strict construction of criminal statutes "is not an inexorable command to override common sense and evident statutory purpose." *United States* v. *Brown,* 333 U.S. 18, 25. On the contrary, "[i]t is sufficient if the words are given their fair meaning

in accord with the evident intent of Congress." *United States* v. *Raynor*, 302 U.S. 540, 552.

In this case, moreover, there is no danger of misleading potential defendants who might legitimately believe their conduct to be lawful in reliance upon a narrow construction of the statute. Whatever the reach of Section 660, the conduct it prohibits is clearly unlawful. Nor is there a danger here of expanding Congress' words beyond their originally intended consequences. As we have shown *supra*, pp. 7–12, employee embezzlements from individually owned carriers were clearly covered by the employee-embezzlement provision enacted in 1946, and there was no manifestation of a purpose to narrow this prohibition in the 1948 revision. Since the word "firm" can naturally be read in its context to include common carriers doing business in the form of individual proprietorships (see footnote 3, p. 6, *supra*), that construction vindicating the purposes and history of the legislation should be adopted.[9]

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[9] Compare *United States* v. *Alpers*, 338 U.S. 680, 681–683, holding that the words "book, pamphlet, picture, motion-picture film, paper, letter, writing, print" as used in a criminal obscenity statute did not immunize the transfer of obscene "phonograph records" in interstate commerce. In reaching this judgment, the Court rested on settled doctrine that the rule of *ejusdim generis* is not to be used to "defeat the obvious purpose of legislation." Similar principles have been applied in situations close to the present case. For example, in *United States* v. *A & P Trucking Co.*, 358 U.S. 121, the question was whether 18 U.S.C. 835, which punished "whoever" violated certain regulations of the Interstate Commerce Commission, reached a partnership *qua* partnership. Despite the usual common law rule that a partnership was not an entity for purposes of suit, this Court followed the legislative purpose in holding that such liability could attach. In *United States* v. *Shirey*, 359 U.S. 255, the Court, in effectuating Congres-

CONCLUSION

The judgment of the district court should be reversed and the indictment reinstated.

Respectfully submitted.

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JANUARY 1966.

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sional purpose, held that a gift to the "Republican Party" was covered by a statute which prohibited payment to a "person, firm or corporation" in exchange for an appointive office in the United States Government. In *United States* v. *Bramblett*, 348 U.S. 503, 506, after an extensive discussion of legislative history, this Court ruled that a false statement "in any matter within the jurisdiction of any department or agency of the United States," covered a fraudulent statement to the "Disbursing Office of the House of Representatives." The rationale articulated in *Bramblett* is equally applicable here (348 U.S. at 509):

> The context in which the language is used calls for an unrestricted interpretation. This is enforced by its legislative history. It would do violence to the purpose of Congress to limit the section to falsifications made to the executive departments. Congress could not have intended to leave frauds such as this without penalty. The development, scope and purpose of the section shows that "department," as used in this context, was meant to describe the executive, legislative and judicial branches of the Government.

See also *United States* v. *Union Supply Co.*, 215 U.S. 50, 55; *Boston Sand Co.* v. *United States*, 278 U.S. 41, 48; *Roschen* v. *Ward*, 279 U.S. 337, 339; *United States* v. *Hood*, 343 U.S. 148, 150–151; *United States* v. *Turley*, 352 U.S. 407, 412–413; *United States* v. *Dege*, 364 U.S. 51, 52; *United States* v. *Braverman*, 373 U.S. 405, 408.

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FILE
APR 9
JOHN F. DAVIS

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 256

UNITED STATES OF AMERICA,

Appellant,

v.

JOHN W. COOK.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

BRIEF FOR APPELLEE, JOHN W. COOK

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argued pro Hac Vice

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UNITED STATES OF AMERICA,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

BRIEF FOR APPELLEE, JOHN W. COOK

Question Presented

Whether 18 U.S.C. 660, prohibiting certain embezzlements by employees of "any firm, association, or corporation engaged in commerce as a common carrier," applies to the conduct of an employee of an individual engaged as a common carrier.

Statute Involved

18 U.S.C. 660 provides, in pertinent part:

> Whoever, being a president, director, officer or manager of any firm, association, or corporation engaged in commerce as a common carrier, or whoever, being

an employee of such common carrier riding in or upon any railroad car, motortruck, steamboat, vessel, aircraft or other vehicle of such carrier moving in interstate commerce, embezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property, or assets of such firm, association, or corporation arising or accruing from, or used in, such commerce, in whole or in part, or willfully or knowingly converts the same to his own use or to the use of another, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

* * * * *

Statement

The statement of the proceedings in the United States District Court for the Middle District of Tennessee is accurately stated in the brief for the United States at pages 2 and 3.

ARGUMENT

Introduction and Summary

In combining 18 U.S.C. 412 and 18 U.S.C. 409 (a)(5) to form Section 660 of the Criminal Code of 1948 Congress deleted the phrase "any carrier" from the employee-embezzlement provision of Section 409 (a)(5). Thus the new Section 660 applied to embezzlement by an employee of any "firm, association, or corporation." Prior to the enactment of Section 660 it was manifest that Congress intended to include individuals engaged as common carriers within the protection of federal law. This clarity of

purpose no longer exists under Section 660. In order to hold that individual carriers are within the scope of the statute it is necessary to conclude that Congress considered the word "firm" as the equivalent of "individual". The legislative history of Section 660 clearly negates the proposition that Congress ever considered the word "firm" to be synonymous with, or the equivalent of, "individual". It is only by a strained and artificial construction of the plain words of the Section 660, that employee embezzlements from individual carriers can be held within its scope.

I.

Prior to the Enactment of 18 U.S.C. 660 Embezzlements by Employees of Individuals Engaged as Common Carriers Clearly Constituted an Offense Against the United States Under 18 U.S.C. 409 (a)(5).

It is clear that 18 U.S.C. 660 is basically derived from a combination of Section 412 of the Criminal Code (18 U.S.C. 412 (1946 ed.)) and Section 409 (a)(5) (18 U.S.C. 409 (1946 ed.)), Section 412, the executive-embezzlement provision, was directed toward named executives of any "firm, association, or corporation." Section 409 (a)(5), on the other hand, was aimed at embezzlement by an employee "of any carrier."[1] We do not dispute that the phrase "any carrier", contained in Section 409 (a)(5), was broad enough to include employee embezzlement from an individual engaged as a common carrier. Appellant suggests that the specific inclusion in Section 409 (a)(5) of the offense now under consideration is indicative of legislative intent to

[1] The pertinent context of Section 412 and Section 409(a)(5) is fully set out in the brief for the United States at pp. 5-6, 8.

continue to afford protection to the individual carrier under Section 660. This argument cuts both ways. Prior to the enactment of 18 U.S.C. 660 it was perfectly clear that individually owned carriers were among the entities protected by Section 409 (a)(5). It is self-evident, however, that subsequent to the enactment of Section 660 employee-embezzlements from individuals engaged as common carriers are no longer indictable offenses with any degree of clarity, because the words "any carrier" were deleted from the statute.

II.

The Phrase "Any Carrier" Was Specifically Deleted From Section 409 (a)(5) When Congress Merged the Section to Form Section 660 Thereby Specifically Excluding Employee Embezzlements From Individuals Engaged as Common Carriers.

a. Before probing the question of what Congress intended to do, it is appropriate to examine what Congress in fact did with respect to Section 660. The executive-embezzlement provision of Section 412 of the 1946 Code utilized the appropriate language, "firm, association or corporation" to designate the entities protected. It would not have been appropriate to include individually owned carriers among these entities because the executive of the individual carrier would normally be the owner. The employee-embezzlement provision of Section 409 applied broader terms so as to include embezzlement from "any carrier." When Congress revised the Criminal Code in 1948 it did more than to simply merge Section 412 and Section 409 (a)(5). In drafting Section 660, Congress specifically eliminated the phrase "any carrier", which had been con-

tained in Section 409 (a)(5), and substituted the language "such common" carrier, referring to any "firm, association, or corporation" engaged as a common carrier. It can be fairly and reasonably inferred, on this basis alone, that Congress intended to eliminate employee embezzlements from individual carriers from the scope of Section 660. In *Schmokey* v. *United States*, 182 F.2d 937, the Court of Appeals for the Tenth Circuit, after noting the derivation of Section 660 and after recognizing that individually owned carriers had been protected by Section 409 (a)(5), stated:

> (B)y the plain language of § 660 supra, 'employee' is limited to employees of a firm, association, or corporation. 182 F.2d at 937.

The *Schmokey* case appears to be the only decision on the issue presented and the Court determined the question squarely against Appellant's contentions.

b. It is suggested by Appellant that Congress understood the two phrases, "any carrier . . . in . . . commerce" and "any firm, association, or corporation engaged in commerce as a common carrier" as equivalents; that it evidently found the latter phrase "stylistically more suitable" for use in Section 660. More particularly, Appellant urges that the word "firm" includes an "individual" engaged in commerce as a common carrier. There is nothing in the legislative history of Section 660 to suggest that Congress ever considered "firm" as synonymous with or the equivalent of, an individually owned carrier. On the contrary, prior to the enactment of Section 409 (a)(5), the larceny provision covered larceny of property in commerce from "any person, firm, association, or corporation," 43 Stat. 793, thus clearly recognizing a distinction between larceny from a

"person" (or individual) and a "firm". Senator McCarren's bill, introduced in March, 1945 (S. 739, 79th Cong., 1st Sess.), would have resulted basically in a combination of what later became Section 412 and Section 409 (a)(5) of the Criminal Code of 1946. Senator McCarren proposed to make it an offense to embezzle funds arising or accruing from interstate commerce when committed by a "director, officer, or employee of any person, firm, association, or corporation engaged in commerce as a carrier. . . ." Again, S. 739 clearly recognized the distinction between "person" (or individual) and the word "firm". As we have indicated, S. 739 would have included executive-embezzlements as well as employee-embezzlements; it was, therefore, appropriate to include the word "person" in order to encompass employee embezzlements from individual carriers. In 1946 the Congress enacted the executive and employee embezzlement provisions as two distinct sections of the Criminal Code, i.e., Section 412 and Section 409 (a)(5). In so doing, distinct terminology was used to described the entities protected. The executive-embezzlement provision, quite appropriately for the reason stated previously, specified embezzlement from any "firm, association, or corporation." The employee provision adopted the broader language, "any carrier" to include embezzlement from a person or individual engaged as a common carrier. The distinct language used in Sections 412 and 409 (a)(5) of the 1946 Code is indicative of the fact that Congress recognized that broader terminology was necessary to include individual carriers under Section 409 (a)(5); and, again emphasizes that Congress did not consider the two phrases as synonymous or equivalent. Certainly, it must be conceded that the phrase "any carrier . . . in . . . commerce" is the broader,

more inclusive, terminology. It is difficult to understand why Congress did not use this comprehensive language if it intended to continue to afford federal protection to "any" common carrier. We do not believe the question is answered upon the assumption that "any firm, etc." was stylistically more suitable for use throughout Section 660. While the Revisor's Note accompanying Section 660 is not very illuminating, it is conceded that, in general, the 1948 revision of the Criminal Code was not a revision of substance. The preface to Title 18 U.S.C.A., Vol. 1, pp. V, VI does recognize, however, that there are exceptions.[2]

Admittedly, Section 660, as construed by the Court below and the Tenth Circuit Court of Appeals in *Schmokey* v. *United States, supra,* constitutes a substantive change in the law. But we find it difficult to characterize the modification of Section 660 as being of major substantive significance. There appear to have been only two indictments returned against employees of individual carriers since the 1948 revision. We may merely speculate that either state embezzlement laws have been adequate to cope with the situation or that the United States Attorneys for the several Districts have not considered such offenses indictable under the plain language of Section 660 and/or have concurred with the conclusion reached in the *Schmokey* case. Moreover, Congress has not seen fit to overrule *Schmokey*

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[2] *Honea* v. *United States,* 344 F. 2d 798 (C.A. 5), while holding that the deletion of the words "with intent to defraud the United States or any person" from 18 U.S.C. 912 did not effect a substantive change in the law, did recognize that there are exceptions to the general rule that the 1948 revision was not intended to effect substantive changes. Further, in the *Honea* case, the Revisor's note specifically stated that the quoted language was omitted in view of the Court's decision in *United States* v. *Lapowich,* 318 U.S. 702.

v. *United States* by legislative action although over fifteen years have elapsed since the court's decision. It is not suggested that the failure of Congress to take affirmative action necessarily evidences conclusive legislative approval of the judicial interpretation of Section 660; however, such inaction points in that direction and tends to deflate Appellant's suggestion of the enormity of the problem in regard to individual carriers.

c. Appellant urges that it would be unreasonable to conclude that Congress intended to afford immunity to employees of individually owned carriers while punishing precisely the same conduct when committed by employees of carriers operating under a different form of ownership.[3] It is questionable whether Congress need have any reason to exclude employee embezzlements from individual carriers under Section 660. Regardless of the motives and reasonableness of Congressional action, Appellant's con-

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[3] We do not find it wholly unreasonable to attribute to Congress the intention to exclude individual carriers from the scope of Section 660. It can be reasonably presumed that the great majority of employees of individually owned carriers are over the road truck drivers as distinguished from employees engaged in clerical positions normally employed by partnerships or corporations. The former type of employee is not ordinarily in a position to embezzle substantial sums nor is he in a position to conceal such embezzlements for any appreciable length of time. It is to be noted that the Department of Justice opposed the legislation in question from the beginning upon the ground that it would bring into Federal courts minor embezzlements of a local nature which were better left to state action. See Brief for the United States pp. 8-10 N. 5. The instant case represents a perfect example in that we are here dealing with the alleged embezzlement by a truck driver of $200.00 accruing from an interstate shipment of bananas (R. 1). We find it no less reasonable to speculate that Congress intended to eliminate at least a portion of these minor offenses than to presume that Congress deleted the phrase "any carrier" in drafting Section 660 for the sake of style.

tention is based primarily upon a consideration of the mischief which the legislature sought to remedy and not upon what Congress in fact did when it eliminated the phrase "any carrier" from Section 409 (a)(5) in merging the section into the new Section 660. The Court of Appeals for the Fourth Circuit in *Ventimiglia* v. *United States,* 242 F.2d 620, appropriately answers Appellant's contention:

> A criminal statute is not to be stretched to cases not covered merely because it may seem to a court that Congress would have done well to cover them. Even when the court may feel that if the omission had been called to the attention of Congress, it might have written the statute differently to cover the omitted case, the Court is not empowered to exercise the task of revision. 242 F.2d at 623.

It is well established that where the language of the statute itself does not plainly include the offense in question, it is not within the province of the Court to make it so simply "because it is of equal atrocity or of kindred character with those which are enumerated. . . ." *Bouie* v. *City of Columbia,* 378 U.S. 347 (quoting Marshall, C.J., 5 Wheat. 76, 96).

III.

A Fair Reading of Section 660 in Accord With the Ordinary Usage of the Language Employed by Congress Requires the Exclusion of Individuals Engaged as Carriers From the Protection of the Statute.

a. The rule that penal laws are to be strictly construed is too well established to require citation to authority. This rule of strict construction is founded upon the high regard of the law for the rights of individuals and upon the principle that the power of punishment is vested in the legislative and not the judicial department.[4] We recognize, however, that the mere recitation of rules of statutory construction does not resolve the issue in this case. Strict construction does not require the Court to disregard common sense and manifested statutory purpose and it is sufficient if the words are given their fair meaning in accordance with their ordinary usage and general acceptance. But it is respectfully insisted that the word "firm" cannot fairly be read to include individual carriers engaged in commerce, and it is submitted that by the plain language of 18 U.S.C. 660, embezzlement by an employee of an individual engaged in commerce is not included as a Federal offense.[5] As we have shown, Congress has consistently considered the language "any firm" and "any person" (or individual) as distinct. While the United States contends that "firm" can naturally be read in context to include an individual engaged as a common carrier,[6] we have been

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[4] *United States* v. *Wiltberger*, 5 Wheat. 76.

[5] *Schmokey* v. *United States*, 182 F. 2d 937.

[6] *United States* v. *Alpers*, 338 U.S. 680, cited at p. 15 N. 9 of appellant's brief, is not difficult to reconcile with the principle that

unable to find any case from any jurisdiction which has ever held the word "firm" to be synonymous with or the equivalent of the term "individual". On the contrary, every case found which has considered the import of the word "firm" has held the term to be synonymous with "partnership".[7] The word "firm", according to its ordinary usage

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the statutory words are to be given their fair meaning when it is noted that in addition to the enumerated obscene materials prohibited, e.g., books, pictures, etc., the statute went further to prohibit interstate shipment of "other matter of indecent character". The Court held that the latter phrase was broad enough to fairly include interstate shipment of obscene phonograph records. The *Alpers* case is not comparable to appellant's contention in the instant case, i.e., that "firm" is so comprehensive as to be the equivalent of "individual". *United States* v. *A & P Trucking Co.*, 358 U.S. 121, cited by appellant at p. 15 N. 9, is readily distinguishable. Here a partnership was charged with violation of 18 U.S.C. 835, imposing criminal penalties upon "whoever" knowingly violated Interstate Commerce Commission regulations pertaining to interstate transportation of explosives. The Court held that 1 U.S.C. 1, which provided that in determining the meaning of any act of Congress the word "whoever" includes "partnerships", was applicable to 18 U.S.C. 835 and, therefore, concluded that partnerships were within the scope of the statute. Unlike the *A & P Trucking Co.* case there are no statutory rules of construction to lead the Court to the conclusion that "firm" is to be construed as the equivalent of "individual". The Court's holding in *United States* v. *Shirey*, 359 U.S. 255, that the Republican party is a "person" within the meaning of 18 U.S.C. 214 is not comparable to the instant case. This construction is in accord with the fair implication of the term "person" since the Republican party is composed of persons. It is not difficult to find cases construing the word "person" to include a group of individuals, e.g., *United States* v. *A & P Trucking Co.*, *supra;* but the converse is not true. Neither do we find it difficult to accept that the term "department", as used in 18 U.S.C. 1001, can naturally and fairly be read to include the legislative and judicial branches of the government.

[7] E.g., *Thomas-Bonner Co.* v. *Hooven*, 284 F. 377, 380 ("The word 'firm' is synonymous with 'partnership' "); *Gustafson* v. *Taber*, 125 Mont. 225, 234 P.2d 471, 475 ("The word (firm) is used as synonymous with partnerships."); *McMillen* v. *Industrial Comm'n*, 13 Ohio App. 310 specifically holds that "firm", used in its ordinary sense, designates a partnership and not a "person" or corporation.

is synonymous with and the equivalent of "partnership".[8] It is only by a strained and artificial construction that "firm" can be held the equivalent of "individual".[9]

b. Conflicting inferences may be drawn from the legislative history of 18 U.S.C. 660 and differing conclusions may be reached with respect to the actions of Congress in regard to the employee embezzlement provision. In this situation it is submitted that the Court's statement in *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218 is fully applicable:

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[8] *Webster's Third New International Dictionary—Unabridged* (1961 ed.) p. 856, defines "firm" as "a partnership of two or more persons not recognized as a legal person distinct from the members composing it,". The United States points out that *Webster's* also defines "firm" as "the name, title or style under which a company transacts business:", but that same authority defines "company" as "An *association of persons* for carrying on a commercial enterprise or business (as a partnership or stock company)." *Webster's Third New International Dictionary—Unabridged* (1961 ed.).

[9] Compare *United States* v. *Harris*, 177 U.S. 305, holding that receivers, appointed to manage and control the Philadelphia and Reading Railroad were not liable to an action for penalties under U.S. Rev. Stat. Sections 4386-4389 for failure to comply with regulations as to transportation of livestock by "any company, owner, or custodian of such animals." After acknowledging the government's insistence that the courts had to some extent relaxed the rule of strict construction generally applied to penal statutes, the court stated:

> It must be admitted that, in order to hold receivers, they must be regarded as included in the word "company". Only by a strained and artificial construction, based chiefly upon a consideration of the mischief which the legislature sought to remedy, can receivers be brought within the terms of the law . . . It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the legislature when enumerating the classes of persons who are subject to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute. 177 U.S. at 309.

> Not that penal statutes are not subject to the basic consideration that legislation like all other writings should be given, insofar as the language permits, a commonsensical meaning. But when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication. 344 U.S. at 222.

See, also, *United States* v. *Harris,* 177 U.S. 305; *United States* v. *Shackney,* 333 F.2d 475.

Conclusion

The judgment of the district court should be affirmed.

Respectfully submitted,

THOMAS H. PEEBLES, III,
Attorney for Appellee.

SUPREME COURT OF THE UNITED STATES

No. 256.—October Term, 1965.

United States, Appellant, *v.* John W. Cook.	On Appeal From the United States District Court for the Middle District of Tennessee.

[May 23, 1966.]

Mr. Justice White delivered the opinion of the Court.

The question presented is whether 18 U. S. C. § 660 (1964 ed.), which prohibits certain embezzlements by employees of "any firm, association, or corporation engaged in commerce as a common carrier," [1] applies to the conduct of an employee of an individual doing business as a common carrier. The indictment in this case charged that, while riding on his employer's truck, defendant, "a truck driver for Tolbert Hawkins, an individual engaged in commerce as a common carrier," embezzled approximately $200 from funds of his employer accruing from an interstate shipment of bananas. Holding that the indictment failed to charge an offense within § 660 because it charged that defendant acted as an em-

[1] "Whoever, being a president, director, officer, or manager of any firm, association, or corporation engaged in commerce as a common carrier, or whoever, being an employee of such common carrier riding in or upon any railroad car, motortruck, steamboat, vessel, aircraft or other vehicle of such carrier moving in interstate commerce, embezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property, or assets of such firm, association, or corporation arising or accruing from, or used in, such commerce, in whole or in part, or willfully or knowingly converts the same to his own use or to the use of another, shall be fined not more than $5,000 or imprisoned not more than ten years, or both." 18 U. S. C. § 660 (1964 ed.).

ployee of "an individual" while § 660 forbids the proscribed acts only when committed by employees of a "firm, association or corporation," the District Court dismissed the indictment. Accord, *Schmokey* v. *United States*, 182 F. 2d 937 (C. A. 10th Cir. 1950). The United States brought a direct appeal pursuant to 18 U. S. C. § 3731 (1964 ed.), and we noted probable jurisdiction, 382 U. S. 953.

Section 660 punishes embezzlements from a common carrier by either (1) "a president, director, officer, or manager of any firm, association, or corporation engaged in commerce as a common carrier," or (2) "an employee of such common carrier riding in or upon any . . . vehicle of such carrier moving in interstate commerce."[2] The present form of the statute dates from the 1948 revision of the Criminal Code. Prior to that time, the separate groups—named executives, and employees riding in vehicles in commerce—were the subject of distinct criminal provisions. 18 U. S. C. § 412 (1946 ed.), like the present § 660, applied to named executives of "any firm, association, or corporation engaged in commerce as a common carrier."[3] 18 U. S. C. § 409 (a)(5) (1946 ed.) applied to employees of "any carrier," with no express limitation relating to the form of the employer's owner-

[2] See n. 1, *supra*.

[3] "Every president, director, officer, or manager of any firm, association, or corporation engaged in commerce as a common carrier, who embezzles, steals, abstracts, or willfully misapplies, or willfully permits to be misapplied, any of the moneys, funds, credits, securities, property, or assets of such firm, association, or corporation arising or accruing from, or used in, such commerce, in whole or in part, or willfully or knowingly converts the same to his own use or to the use of another, shall be deemed guilty of a felony and upon conviction shall be fined not less than $500, or confined in the penitentiary not less than one year nor more than ten years, or both, in the discretion of the court." Act of Oct. 15, 1914, 38 Stat. 733, 18 U. S. C. § 412 (1946 ed.).

ship.[4] The legislative history—including a 1946 revision expanding the coverage of the section to all modes of transportation—and the prevalent usage of the expression "any carrier" in statutes regulating commerce convincingly establish that § 409 (a)(5) embraced employees of individual proprietorships. As this much is conceded by defendant, we need not detail that legislative history and common usage here. Defendant urges, however, that the phrase "firm, association, or corporation" absorbed into § 660 from the earlier executive provision, § 412, is not sufficiently broad to include individual proprietors; that the revision in 1948 therefore narrowed the coverage of the employee provision; and that this result is compelled by the general canon of construction that criminal statutes are to be strictly construed. The United States counters that the choice of the language used in the predecessor executive provision, rather than that in the predecessor employee provision, was merely a stylistic preference not evidencing any intent to narrow coverage of employee offenders and that a "firm" may be any business organization, whether individually owned or otherwise.

We think the position of the United States is sound and we reverse the District Court. There is no doubt that the 1946 statute covered employees of individuals

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[4] "(a) Whoever shall—

. . . . . .

"(5) being an employee of any carrier riding in, on or upon any railroad car, motortruck, steamboat, vessel, aircraft, or other vehicle of such carrier transporting passengers or property in interstate or foreign commerce and having in his custody funds arising out of or accruing from such transportation, embezzle or unlawfully convert to his own use any such funds; shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both." Act of Feb. 13, 1913, 37 Stat. 670, as amended, 18 U. S. C. § 409 (a)(5) (1946 ed.).

and in our view it was not intended by adopting the 1948 revision of the Code to make any substantive change in the law by excluding from its coverage the employees of any class of carrier who had been previously covered. The general purpose of the new Code was to "codify and revise . . . the original intent of Congress is preserved," S. Rep. No. 1620, 80th Cong., 2d Sess., p. 1, and with respect to the new § 660, the reviser's note, while noting the consolidation of a portion of § 409 and § 412 and stating that "[c]hanges were made in phraseology," disclosed no intention of making any change in the substantive content or the coverage of the law. See legislative history note following 18 U. S. C. § 660 (1964 ed.). To us the congressional intent to reach the employees of any carrier, whatever the form of business organization, seems reasonably clear.

Respondent relies principally upon the abandonment of the words "employees of any carrier" and the substitution of the present language of § 660 which does not expressly include the employees of "any person" or "any individual" doing business as a common carrier. But the term "firm" is certainly broad enough in common usage to embrace individuals acting as common carriers; [5]

[5] Some sources define "firm" as "[t]he persons composing a partnership, taken collectively." 2 Bouvier's Law Dictionary 1232 (1914); see also Ballentine's Law Dictionary 507 (2d ed. 1948); Black's Law Dictionary 761–762 (4th ed. 1957); Crowell's Dictionary of Business and Finance 225 (rev. ed. 1930); Encyclopedia of Banking and Finance 238 (Garcia, 5th ed. 1949). But other dictionaries, while recognizing that narrow definition, also state that the word has a broader meaning in popular usage, connoting any business entity, including individual proprietorships. For example, the standard American reference defines "firm" both as "a partnership of two or more persons not recognized as a legal person distinct from the members composing it" and as any "business unit or enterprise." Webster's Third New International Dictionary—Unabridged 856 (1961). Accord, Clark and Gottfried, Dictionary of Business and

and in those instances where Congress has explicitly indicated its understanding of the term, the definition of "firm" has included individual proprietorships. 19 U. S. C. § 1806 (3) (1964 ed.); 19 U. S. C. § 2022 (1)(3) (Supp. I, 1965).[6]

Nor has any plausible reason been advanced for drawing a distinction between employees of individuals and employees of partnership or corporate common carriers. The possible burden to interstate commerce or the need for federal jurisdiction to supplement state jurisdiction—in view of the frequent difficulty of showing in what

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Finance, 152 (1957) ("Strictly an unincorporated business carried on by more than one person, jointly; a partnership. . . . In popular usage, any business, company, or concern, incorporated or not."); Dictionary of Business and Industry 218 (Schwartz ed. 1954) ("A business partnership; any business house or organization, no matter what its legal form . . ."); Dictionary of English Law 807 (1959) ("the style or title under which one or several persons carry on business"); Dictionary of Foreign Trade 308 (Henius, 2d ed. 1947) ("The name or title under which one or more persons do business").

While numerous decisions of state courts have enunciated a restrictive definition of "firm"—and in turn have influenced the definition given in law dictionaries, see the citation to *Firestone Tire & Rubber Co.* v. *Webb*, 207 Ark. 820, 182 S. W. 2d 941 (1944), in Black's Law Dictionary, *supra*—such decisions have not involved the issue of whether an individual proprietorship may be deemed a "firm." Typically the question has been whether two or more persons holding themselves out as a firm should be held to constitute a partnership for various purposes of partnership law such as liability on a partnership note, *Firestone Tire & Rubber Co.* v. *Webb*, *supra*, imputation of knowledge from partners to the partnership, *McCosker* v. *Banks*, 84 Md. 292, 35 A. 935 (1896), or liability of one partner for the acts of another, *Bufton* v. *Hoseley*, 236 Or. 12, 386 P. 2d 471 (1963).

[6] The two provisions are identical and read as follows:

"The term 'firm' includes an individual proprietorship, partnership, joint venture, association, corporation (including a development corporation), business trust, cooperative, trustee in bankruptcy, and receivers under decree of any court. . . ."

State the crime occurred—does not vary with the form of business organization. On the other hand, since a large portion of common carriers are individually owned proprietorships,[7] acceptance of defendant's interpretation of § 660 would exclude a substantial segment of the industry from the coverage of the Act—a result that should not be inferred from the 1948 "changes . . . in phraseology" without some specific indication that Congress had receded from the intention it clearly expressed in 1946 of expanding coverage of the Act to all carriers, see S. Rep. No. 1632, 79th Cong., 2d Sess.

We are mindful of the maxim that penal statutes should be strictly construed. But that canon "is not an inexorable command to override common sense and evident statutory purpose," *United States* v. *Brown*, 333 U. S. 18, 25, and does not "require that the Act be given the 'narrowest meaning.' It is sufficient if the words are given their fair meaning in accord with the evident intent of Congress." *United States* v. *Raynor*, 302 U. S. 540, 552; see also *United States* v. *Bramblett*, 348 U. S. 503; *United States* v. *A & P Trucking Co.*, 358 U. S. 121; *United States* v. *Shirley*, 359 U. S. 255. In this case the fair meaning of the term in dispute—as evidenced by common usage and its statutory meaning in other contexts—and the manifest intention of Congress in using it here leads us to conclude that § 660 encompasses embezzlements by employees of individual proprietorships.

Reversed.

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[7] A random sampling of 1,500 of 11,700 ICC certificated Class III motor carriers of property (*i. e.*, those with an annual revenue of less than $200,000) showed that at the end of 1964 almost 40% were individually owned and operated. About 1% operated in partnership form, and the remainder operated as corporations. Brief of United States 13, n. 8.